Supreme Court, U.S.
FILED

No. 03 700 SEP 2 2003

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

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MICHAEL S. BARTH,

*Petitioner,*

*v.*

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a Corporation of the State of New Jersey,

*Respondent.*

---

On Petition for Writ of Certiorari
To the New Jersey Supreme Court

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# PETITION FOR WRIT OF CERTIORARI

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Michael Barth
P.O. Box 315
Liberty Corner, New Jersey 07938
(908) 672-9662

43 pp

## QUESTIONS PRESENTED

1. Whether PSE&G condemnation and occupation of Petitioner's land without compensation violates the Fifth and Fourteenth Amendments of the United States Constitution.

2. Whether New Jersey Eminent Domain Statute as Applied to the Instant Facts Violates the Fifth and Fourteenth Amendments of the United States Constitution.

## PARTIES

Petitioner is Michael Barth.

Respondent is Public Service Electric and Gas Company, a Corporation of the State of New Jersey.

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28 U.S.C. § 1257 . . . . . .1

New Jersey Eminent Domain Statute, N.J.S.A. 20:3-1 .1, 5

Petitioner Michael Barth's land was taken without compensation by Respondent Public Service Electric and Gas (PSE&G). Petitioner challenges that Taking under the rights guaranteed by the United States Constitution. State remedies are exhausted in that attempted appeal in the New Jersey Supreme Court is completed.

## OPINIONS AND ORDERS BELOW

The New Jersey Supreme Court orders refusing discretionary review are unreported except that a June 23, 1999 denial is reported at 161 N.J. 142, 150. App. A1-2, 19. The decisions of the New Jersey Appellate Division are unreported. App. A3-10. The judgments of the New Jersey Superior Court are unreported. App. A17-18, 20-27. The judgment of the District Court of New Jersey, staying proceedings of the New Jersey Office of Administrative Law on Removal, is unreported. App. A11-14.

## JURISDICTION

The last Order of the New Jersey Supreme Court that denied certification was entered on June 5, 2003. The United States Supreme Court's jurisdiction rests on 28 U.S.C. § 1257.

## STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall … be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1.

The New Jersey Eminent Domain Statute, N.J.S.A. 20:3-1 et seq., for purpose of brevity, is not included in its entirety.

## STATEMENT OF THE CASE

Petitioner owns property in the Far Hills section of Bernards Township, Somerset County, New Jersey. On or about August 5, 1998, PSE&G constructed a gas pipeline across Mr. Barth's property. The Superior Court refused to enjoin that entry. App. A17-18. Three years later a jury awards Mr. Barth $5,000 for that Taking. PSE&G refused to pay the award. The New Jersey Courts refused to Order PSE&G to actually pay the jury award. App. A23. The New Jersey Supreme Court denied certiorari to grant Mr. Barth any justice in the matter. Mr. Barth exhausted state court remedies and seeks United States Supreme Court intervention.

## REASONS FOR GRANTING THE WRIT

New Jersey has allowed a Corporation to take Petitioner's land without compensation in violation of the United States Constitution. Moreover, under the guise of the New Jersey Eminent Domain statute, in addition to being taken without compensation, Petitioner's land was taken without even basic constitutional safeguards.

## ARGUMENT

### I.
### Property Ownership is a Fundamental Constitutional Right and Taken Without Compensation is Unconstitutional.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall … be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V. The Supreme Court has repeatedly held that state governments, or state actors, are similarly prohibited by the Fourteenth Amendment's Due Process Clause, from taking private property without paying for it. Nollan v. California Coast Commission, 483 U.S. 825 (1987). PSE&G stole landowner's property, and landowner has not been compensated, and state remedies are exhausted. Such a Taking is Unconstitutional.

## II.
## The New Jersey Eminent Domain Act that Allows Deprivation of Basic Constitutional Protections is Unconstitutional.

The New Jersey Eminent Domain Statute is found at N.J.S.A. 20:3-1 et seq. Under this statute, Mr. Barth was taken and the process employed denied constitutional due process and equal protection. For example:

- The New Jersey (NJ) Office of Administrative Law (OAL) was without jurisdiction to decide PSE&G was entitled to condemn Mr. Barth's property as the matter was removed from the OAL to US District Court, suspended by the District Court, and at the request of then New Jersey Attorney General Deborah Poritz remanded back to the NJ Board of Public Utilities, and never transferred after that removal and remand to the OAL. App. A11-15.
- The OAL refused to allow Mr. Barth to call witnesses from e.g., the United States Department of Transportation, Pipeline Safety Division (in connection with a temporary pipeline constructed along Mr. Barth's property. A related pipeline was ruptured along the front of Mr. Barth's property). App. A30.
- Even though PSE&G admitted to the OAL that if its title search was defective, its condemnation was null and void, the OAL refused to consider (said it lacked jurisdiction) the defectiveness of PSE&G title search.
- The OAL refused to consider (said it lacked jurisdiction) Mr. Barth's counter claims of property damage – caused by PSE&G – that went to the necessary issue of good faith.
- The NJ OAL decided to allow the condemnation of Mr. Barth property based on transcripts PSE&G filed with them but never served on Mr. Barth. App. A28-30.

- In NJ Superior Court, Mr. Barth was not permitted to file an answer to PSE&G's complaint even though PSE&G's previous complaint was dismissed on Mr. Barth's motion to dismiss in lieu of an Answer. This included preclusion of Mr. Barth's counter claims of property damage – items going to "good faith" standard.
- The NJ Superior Court judge who assigned the Condemnation Commissioner communicated with them and PSE&G *ex parte*, that is, without including Mr. Barth. [This was discovered after the judge deceased and his clerk cleaned out his desk and put the particular letter in the court's files.] App. A24.
- The Condemnation Commissioners, at the advice of the NJ Superior Court Judge, relied on pleadings filed with them by PSE&G and that were not provided to landowner. App. A24-25.
- The jury trial judge refused to allow Mr. Barth to cross-examine PSE&G's witness on testimony raised on direct testimony of PSE&G's witness.
- The jury trial judge refused to allow Mr. Barth to testify in his own defense. The trial judge subsequently resigned from the bench the result of a separate felony crime he apparently pleaded guilty. The transcripts of the jury trial were in many ways inaudible. The NJ Appellate Division ruled that the jury trial judge should clarify the record but that landowner was prejudiced in that this could not be done because the Judge resigned. App. A3-5.
- The jury trial judge refused to grant interest on the jury award, even though condemnation basically near 10 years old. *See e.g.*, Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 14 (1984) (owner entitled to interest if payment after taking.) App. A25.
- Ironically the New Jersey Supreme Court has not returned any of Mr. Barth's deposit ordered by the New

Jersey Supreme Court to cover the costs of PSE&G pleadings that were filed inconsistent with the NJ Supreme Court Order.

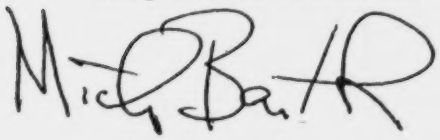
- On June 5, 2003, the New Jersey Supreme Court issued an order refusing to review these inequities. New Jersey Supreme Court Chief Justice Deborah Poritz who signed this Order also previously defended PSE&G's case as New Jersey Attorney General. App. A1.

Clearly this is an abuse of the "use of enjoyment" of the public when clearly the Shareholders of Corporate Public Service Electric & Gas Company enjoy the profits of the land they have taken without Compensation. Clearly the New Jersey Eminent domain statute that allowed appropriation of private property without adequate provision for the payment of compensation and without minimum due process consideration is unconstitutional and void. *See. E.g.,* Sweet v. Rechel, 159 U.S. 380 (1895).

## CONCLUSION

These reasons are a sample of the Constitutional deprivation in this matter that will be briefed in greater detail upon the granting of certiorari. For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Michael Barth
September 1, 2003

*Appendix* A1

SUPREME COURT OF NEW JERSEY
C-995 September Term 2002
53,887
ON PETITION FOR CERTIFICATION

PUBLIC SERVICE ELECTRIC
AND GAS COMPANY, A CORPORATION
OF NEW JERSEY,
Plaintiff-Respondent,
v.
MICHAEL BARTH,
Defendant-Petitioner.

**FILED JUN 5 2003**
**STEPHEN W TOWNSEND, CLERK**

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4745-00 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 4th day of June 2003.

*S/Stephen W Townsend*
CLERK OF THE SUPREME COURT

The foregoing is a true copy of the original on file in my office.

S/*Stephen W Townsend*
CLERK OF THE SUPREME COURT OF NEW JERSEY

*Appendix* A2

SUPREME COURT OF NEW JERSEY
C-995 September Term 2002
M-858/858
ORDER

PUBLIC SERVICE ELECTRIC
AND GAS COMPANY, A CORPORATION
OF NEW JERSEY,
Plaintiff-Respondent,
v.
MICHAEL BARTH,
Defendant-Petitioner.

**FILED MAR 12 2003**
**STEPHEN W TOWNSEND, CLERK**

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file a notice of petition for certification and petition for certification as within time (M-857) is granted; and it is further

ORDERED that the motion for a waiver of the security deposit (M-858) is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 11th day of March, 2003.

*S/Stephen W Townsend*
CLERK OF THE SUPREME COURT

The foregoing is a true copy of the original on file in my office.

S/*Stephen W Townsend*
CLERK OF THE SUPREME COURT OF NEW JERSEY

*Appendix* A3

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4745-00T5

PUBLIC SERVICE ELECTRIC AND
GAS COMPANY, A CORPORATION
OF NEW JERSEY,
Plaintiff-Respondent,
v.
MICHAEL BARTH,
Defendant-Appellant.

**FILED OCT 17 2002**
**S/Jim Flynn, CLERK**

Argued telephonically on September 20, 2002
Decided OCT 17, 2002
Before Judges Stern and Coburn
On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-549-97.
Michael Barth, appellant, argued the cause pro se.
Robert L. Gibbs argued the cause for respondent.

PER CURIUM

After we affirmed an order upholding the right of plaintiff Public Service Electric and Gas Company ("PSE&G") to take an easement on defendant's property and appointing Condemnation Commissioners, and following our subsequent reversal of the Law Division's order dismissing defendant's appeal from the Commissioners' Award, defendant appeals from a judgment of March 15, 2001, awarding him $5,000 based on the jury's verdict at the trial de novo. The right of way easement covered approximately .001% or 390 square feet of defendant's property for purpose of installing a natural gas line.

Defendant argues that he was denied the "right to testify" at the trial de novo, see N.J.S.A. 20:3-13; that the condemnation was

"null and void"; that his is entitled to $17,057.85 in fees and costs;[1] and that he is "entitled to [a] Directed verdict of $500,000, costs and fees."

Our careful review of the record leads us to conclude that the defendant's contentions are without merit and warrant only the following discussion. R. 2:11-3(e) (1) (B) (E).

At the opening of the trial before jury selection on February 21, 2001, defendant advised the judge that he was "planning just to rely on cross examination" and would not call witnesses. At the trial, plaintiff called an expert, Leo Souza, who opined that the value of the property taken was $390, but because the taking was an easement, not a fee, the value of the taking was only $200. He also concluded that the taking would have "no effect on the balance of the property."

Towards the end of Souza's cross-examination he was being asked about the ability to subdivide the property. The record thereafter reflects the following:

THE COURT: Mr. Barth, I want to see counsel at sidebar.

(Sidebar discussion out of hearing of the jury:)

THE COURT: Mr. Barth, do you have any intention of offering any testimony to indicate that the subdivision (indiscernible.)

MR. BARTH: (Indiscernible.)

THE COURT: I understand you're calling no witnesses (indiscernible); is that correct?

MR. BARTH: (Indiscernible.)

(The rest of sidebar not discernible.)

(Back in the hearing of the jury.)

THE COURT: Next question.

---

[1] In his proposed order which was denied by the trial judge on March 21, 2001, defendant sought $10,000 in costs and $2,057.85 in "compound interest" in addition to the $5,000 award.

After the expert testified and defendant moved exhibits into evidence, the defendant indicated that "[n]ot being able to testify myself," he would call no witness.

Defendant contends that, at the sidebar conference, the trial judge told plaintiff he could not testify, thereby depriving him of his "fundamental right" to do so. It is unfortunate that portions of the conference are "inaudible." It is also unfortunate that defendant did not move to reconstruct the record while the judge was still on the bench, if he wanted to raise this point in his brief. See R. 2:5-5(a). In any event, we are satisfied, by reading the record as a whole, that the trial judge did no more than preclude defendant from testifying as an expert regarding the impact of the easement on the ability to subdivide his property. See N.J.R.E. 701-702.

We cannot reconsider our prior determination upholding the condemnation itself. However, because the jury verdict was greater than the Commissioners' award, defendant was entitled to taxed costs. See R. 4:73-8. The judgment awarded "the sum of $5,000.00 damages and costs of suit to be taxed." The record reflects that the clerk entered an award of $215 in taxed costs.

The judgment is affirmed.

**I hereby certify that the foregoing is a true copy of the original on file in my office.**
**S/Jim Flynn**
**CLERK OF THE APPELLATE DIVISION**

*Appendix* A6

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-361-99T1

PUBLIC SERVICE ELECTRIC AND GAS,

Plaintiff-Respondent,

v.

MICHAEL BARTH,

Defendant-Appellant.

**FILED OCT 12 2000**
**S/Jim Flynn, CLERK**

Argued: September 26, 2000 – Decided: OCT 12 2000
Before Judges Stern and A.A. Rodriguez.
On appeal from the Superior Court of New Jersey, Law Division, Somerset County.
Michael Barth, appellant, argued the cause pro se (Mr. Barth filed a pro se brief).
Robert L. Gibbs argued the cause for respondent (Mr. Gibbs on the brief).

PER CURIUM

Defendant, Michael Barth, a property owner, appeals from an order denying his application for an appeal from a Condemnation Commissioners' award. The trial court denied his request because Barth failed to appear at the Condemnation Commissioners' hearing. We reverse and remand.

These are the salient facts and pertinent procedural history. Barth is the owner of property in Bernard's Township. Public Service Electric and Gas (PSE&G) sought to acquire a right-of-way utility easement over Barth's property. This easement covers 390 square feet of Barth's property. The easement represents .001 percent of the total property owned by Barth. It runs parallel to a roadway on the wooded edge of Barth's

property. PSE&G offered $200 as just compensation for the easement based upon an appraisal performed by Professional Appraisal Associates. The offer was rejected. Therefore, PSE&G sought to acquire the easement through the exercise of eminent domain pursuant to N.J.S.A. 48:3-17.6 to 17.10.

After an evidentiary hearing in the Office of Administrative Law, the Board of Public Utilities (BPU) determined that the easement being sought by PSE&G was reasonably necessary for the service, accommodation, convenience and safety of the public. Therefore, the BPU granted PSE&G "permission to proceed to exercise the power of eminent domain pursuant to N.J.S.A. 48:3-17.7."

PSE&G filed a Verified Complaint in condemnation. Barth answered. The trial court appointed three independent condemnation commissioners to determine the value of the property to be taken. The Presiding Condemnation Commissioner notified Barth and all interested parties that there would be a hearing on November 24, 1997. Barth attempted to adjourn the hearing by leaving a voice message for the Presiding Commissioner approximately two hours before scheduled time. He was advised, via voice message from the Presiding Commissioner, that there was no authority to adjourn the hearing on such short notice. The hearing proceeded in Barth's absence. At the hearing, testimony was taken from Nicholas Arocha, Senior Consultant, Corporate Properties, PSE&G and Leo Souza, MAI, SRA of Professional Appraisal Associates. The Condemnation Commissioners decided that $200 was just compensation.

Barth then appealed the Condemnation Commissioners' award pursuant to N.J.S.A. 20:3-13. PSE&G opposed this application due to Barth's failure to comply with N.J.S.A. 20:3-13(a). This statute requires that a party seeking to appeal the Condemnation Commissioners' award must have appeared at the hearing. The trial court heard testimony to determine if Barth received proper notice of the Condemnation Commissioners' hearing. The trial

court found that Barth was properly notified of the hearing and dismissed the appeal of the award.

Barth now appeals contending:

I. As a matter of state statute, court rule, and legal precedent, the condemnation commissioners' report null and void as the commissioners were required to adjourn the hearing until the title holder was served with all documentation presented to the commissioners. N.J.R. 4:73-11; N.J.S.A. 20:3-1 et seq.; N.J.S.A. 20:3-6; Morris County v. Court Street Ltd., 223 N.J. Super. 35, cert. Denied, 111 N.J. 572 (A.D. 1988)

II. The Commissioners report is null and void as the title holder was not served with required proper certified mail notice of the commissioners' hearing.

III. Commissioners' report null and void as undated.

IV. The lower court lacked jurisdiction to hear PSE&G's three separate motions to dismiss title holder's appeal of the condemnation commissioners' report.

V. The lower court committed reversible error under N.J.R. 73-6 by changing the standard and burden of proof for proper notice and service of the commissioners' hearing.

VI. PSE&G called the commissioner as it witness before the court below when, as a matter of state statute, the commissioner was suppose to be the court's impartial witness.

VII. Court committed reversible error not allow cross-examination of matters raised by PSE&G on direct examination.

VIII. Court refused to act on defendant's cross-motion to declare the condemnation null and void is reversible error.

IX. Commissioners' report null and void as the award was not greater than the "appraised value."

X. Title holder is entitled to costs as taxable against PSE&G since the offer of $200 made to landowner was grossly inadequate. N.J.R. 4:47-8; N.J. Tpk. Auth. v. Bayonne Barrel & Drum Co., 110 N.J. Super. 506 (Law Div. 1970).

It is unnecessary for us to consider all of these contentions because, while this appeal was pending, we decided Borough of Keyport v. Maropakis, 332 N.J. Super. 210 (App. Div. 2000). The Maropakis case holds that:

"[T]he appeal-preclusion consequences of the failure to appear personally or through counsel at the commissioners' hearing, contained in N.J.S.A. 20:3-13(a), make that hearing a critical stage in the condemnation procedure. Because the right of property owners to just compensation for a taking through the exercise of the power of eminent domain is constitutionally founded, we are persuaded that a party entitled to notice of the commissioners' hearing is also entitled to notice of the appeal-preclusion consequences of the failure to appear. Without the right to appeal, the award of the commissioners becomes final, and is tantamount to entry of a default against the non-appearing party. Maropakis, supra, 332 N.J. Super. at 222-23]."

Here it is undisputed that the form of hearing notice used is insufficient in that it failed to adequately advise Barth that should he fail to appear at the hearing, personally or through counsel, he would not be permitted to appeal from the Condemnation Commissioner's award.

We therefore, reverse and remand to the Law Division for an appeal of the Condemnation Commissioners' award pursuant to N.J.S.A. 20:3-13.

**I hereby certify that the foregoing is a true copy of the original on file in my office.**
**S/Emille Cox**
**CLERK**

UNITED STATES DISTRICT COURT
District of New Jersey

Chambers of
JOHN W. BISSELL
Judge

U.S.P.O. & COURTHOUSE
NEWARK, NJ 07102
201-645-2517

LETTER-OPINION

SEPTEMBER 29, 1994

Mr. Michael Barth
P.O. Box 315
Liberty Corner, New Jersey 07938

Re: In the Matter of Petition of PUBLIC SERVICE ELECTRIC AND GAS COMPANY for the Right to Exercise The Power of Eminent Domain Pursuant to N.J.S.A. 43:3-17.6 Affecting Land of MICHAEL S. BARTH; Situate in the Township of Bernards, County of Somerset, And State of New Jersey.
Civil Action No. 94-3921

Dear Mr. Barth:

On August 17, 1994 this Court issued an order remanding the present proceedings to the New Jersey Board of Public Utilities on the basis that removal jurisdiction did not lie because the Board of Public Utilities was not functioning as a state court within the confines of 28 U.S.C. §1441 (a). Under General Rule 12.I of this Court any motion for reconsideration of that ruling would have to be filed with the Court and served upon your adversary within 10 days of the entry of the order. Your present motion for reconsideration is dated September 26, 1994; however I will not decline to consider it solely on the grounds of untimeliness.

Your present papers indicate that on August 30, 1994 the Board of Public Utilities referred this matter to the Office of Administrative Law for further pursuit of this eminent domain proceeding. This development, however, does not affect the status of proceedings at the time of the original removal. The

removability of a state proceeding must be measured as of the date that removal is sought. The Court continues to believe that its determination based on the state of proceedings on August 17, 1994 was correct. Therefore, it will not vacate its prior order of remand of this matter to the New Jersey Board of Public Utilities. Your motion for reconsideration, therefore, is denied as reflected in the enclosed Order.

However, because it is at least arguably possible that the referral of this matter to the Office of Administrative Law does render this action removable, a second petition for removal based upon this development might lie. Under 28 U.S.C. §1446 (b) a notice of removal must be filed "within 30 days after receipt by the defendant ... of a ... paper from which it may first be ascertained that the case is one which is or has become removable ....." It is not entirely clear as to when you first received the Notice of Filing from the Office of Administrative Law; however, I noted that it is dated September 16, 1994. Accordingly, it would appear that your second notice of removal (attached hereto), filed on September 26, 1994 and premised upon the referral to the Office of Administrative Law, is timely. That notice effectuates removal and suspends proceedings before the state forum. 28 U.S.C. §1446(d). Should it choose to do so, PSE&G may move to remand this matter under 28 U.S.C. §1447 (c).

You also seek at this time an Order to Show Cause for a preliminary injunction and related relief. Because the Court continues to have serious doubts about both its jurisdiction and your entitlement to ultimate relief in this Court, it will not sign the requested Order to Show Cause. You may, of course, file a motion for such relief in compliance with the requirements of General Rule 12 of this Court.

Very truly yours,
S/ JOHN W. BISSELL
United States District Judge

Cc: Peter M. Romeo, Esquire
Public Service Electric & Gas Co.

80 Part Plaza – T5G
P.O. Box 570
Newark, New Jersey 07101-0570

State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Orig. filed with the Clerk, U.S. District Court
Newark, New Jersey.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 94-3921

In the Matter of Petition of
PUBLIC SERVICE ELECTRIC AND
GAS COMPANY for the Right to Exercise
The Power of Eminent Domain Pursuant to
N.J.S.A. 43:3-17.6 Affecting Land of
MICHAEL S. BARTH; Situate in the
Township of Bernards, County of Somerset,
and State of New Jersey.

ORDER REMANDING PROCEEDING
PURSUANT TO 28 U.S.C. §1447 (c )

For the reasons stated by this Court in open court on November 14, 1994, that is, that the present matter is not a "civil action" pending in "a State court" within the purview of 28 U.S.C. §1441(a ),

It is on this 18th day of November, 1994 ORDERED that:

1. Pursuant to 28 U.S.C. §1447 (c ) this matter is hereby immediately remanded to the new Jersey Board of Public Utilities, without costs; and

2. Certified copies of this Order of Remand shall be mailed forthwith by the Clerk of this Court to the Clerk of the Board of Public Utilities.

S/ JOHN W. BISSELL
United States District Judge

DEBORAH T. PORITZ
Attorney General of New Jersey
Attorney for Respondent/Movant
New Jersey Board of Public Utilities

....

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY VICINAGE OF NEWARK

In the Matter of Petition of PUBLIC SERVICE ELECTRIC AND GAS COMPANY for the Right to Exercise The Power of Eminent Domain Pursuant to N.J.S.A. 43:3-17.6, Affecting Land of MICHAEL S. BARTH; Situate in the Township of Bernards, County of Somerset, And State of New Jersey.

HON. JOHN W. BISSELL, U.S.D.J.
Civil Action No. 94-3921
NOTICE OF MOTION
FOR REMAND PURSUANT TO 28 U.S.C. §1447 (C ).

TO: WILLIAM T. WALSH
CLERK OF THE COURT

MICHAEL S. BARTH, Pro Se

PETER ROMEO, ESQ.
PUBLIC SERVICE ELCTRIC & GAS COMPANY

GENTLEMEN:

PLEASE TAKE NOTICE that on Monday, November 14, 1994 at 10 a.m. or as soon thereafter as counsel may be heard, the undersigned Deborah T. Poritz, Attorney General of New Jersey, by Gregory Eisenstark, Deputy Attorney General, on behalf of respondent/movant New Jersey Board of Public Utilities shall move before the Honorable John W. Bissell, U.S.D.J., in the United States Court House, Newark, New Jersey for an Order remanding this matter [to] the Board of Public Utilities pursuant to 28 U.S.C. §1447 (c ).

PLEASE TAKE NOTICE that the undersigned will rely on the enclosed brief in support of the motion.

It is respectfully requested that the Court hear oral argument in this matter.

A proposed form of order is attached hereto.

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY
S/Gregory Eisenstark, DAG

...

DATED: October 21, 1994

SUPERIOR COURT OF NEW JERSEY
Wilfred P. Diana
Assignment Judge
908-231-7060
Somerset County Court House
PO Box 3000
Somerville, NJ 08876
Somerset-Hunterdon and Warren Counties

August 5, 1998

X. Paul Humbert, Esq.
80 Park Plaza
P.O. Box 570, T5E
Newark, New Jersey 07102

Michael Barth
P.O. Box 315
Liberty Corner, New Jersey 07938

Re: PSE&G v. Barth
Docket No. L-549-97

Gentlemen:

On September 11, 1997, this Court entered judgment for PSE&G appointing three disinterested commissioners to value the property that is the subject of this condemnation action. On that day, this Court also denied the motion in lieu of an answer of Defendant, as well as, denied Defendant's motions for fees and sanctions. Defendant moved for the Court's reconsideration of that order, which motion was also denied. The commissioners have met and determined the value of the property. Thereafter, the commissioners submitted affidavits of service to this Court and on January 16, 1998, an Order was entered dismissing the commissioners from further obligation in this matter and awarding the commissioners the appropriate fees for the services rendered.

Now, Mr. Barth has once again asked this Court to enjoin PSE&G from entering on his property. It seems Mr. Barth's basis for the request is that he does not know of a recorded

easement for the property in the name of PSE&G. For the following reasons, this Court has refused to entertain the new application.

A Complaint, Declaration of Taking and Order for Payment of Money into Court were filed at the beginning of this matter. Thereafter, a hearing was held and it was determined that PSE&G had exercised its power of eminent domain appropriately. It is the opinion of this Court that it is at that time that PSE&G was allowed the property. However, this matter has progressed further. The commissioners have met and made a determination as to the value of the property. They have submitted their recommendation and they have been compensated for their services. While it appears that Mr. Barth continues to appeal every order entered in this matter, it is clear that PSE&G has every right, title and interest in the property they have sought to take in this matter. As such, this Court will not entertain an application to enjoin PSE&G from entering onto property which they have properly have access to.

In light of the foregoing, the request to make application for an injunction is hereby DENIED.

S/ Wilfred P. Diana, A.J.S.C.

SUPREME COURT OF NEW JERSEY
M-1487 September Term 1997
ORDER

PUBLIC SERVICE ELECTRIC
AND GAS COMPANY, A CORPORATION
OF NEW JERSEY,
Plaintiff-Respondent,
v.
MICHAEL BARTH,
Defendant-Movant.

**FILED AUG 18, 1998**
**STEPHEN W TOWNSEND, CLERK**

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 12th day of August, 1998.

*S/Stephen Townsend*
CLERK OF THE SUPREME COURT

The foregoing is a true copy of the original on file in my office.

S/*Stephen Townsend*
CLERK OF THE SUPREME COURT OF NEW JERSEY

**RECEIVED/FILED**
**MAR 19 2001**
**SUPERIOR COURT SOMERSET COUNTY**

ROBERT L. GIBBS, ESQ.
80 Park Plaza, T-5E
P.O. Box 570
Newark, New Jersey 07102
(973) 430-8590
Attorney for Plaintiff

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

PUBLIC SERVICE ELECTRIC
AND GAS COMPANY, a
New Jersey Corporation, Plaintiff

DOCKET NO. SOM-L-000549-97

v.

ENTRY OF JUDGMENT

MICHAEL S. BARTH;
WORLD SAVINGS BANK,
Formerly known as Watchung Hills
Bank for Savings, SKYLINE FEDERAL
CREDITI UNION, Formerly known as the AT&T
Community Federal Credit Union; and
BERNARDS TOWNSHIP, a Municipal
Corporation of the State of New Jersey,
Defendants.

THIS MATTER being opened to the Court by Robert l. Gibbs, Esq., attorney for the Plaintiff, Public Service Electric and Gas Company, and it appearing to the Court that a verdict was rendered by the jury at the trial of the above entitled action on the 22nd day of February, 2001, in favor of the Defendant, Michael Barth, and against the Plaintiff, Public Service Electric and Gas Company, for the sum of FIVE THOUSAND DOLLARS ($5,000.00) damages, and for good cause shown:

IT IS ON THIS 15TH day of March, 2001, ordered that judgment be entered in favor of the Defendant, Michael Barth, and against the Plaintiff, Public Service Electric and Gas Company, in the sum of $5,000 damages and costs of suit to be taxed.

S/Honorable John F. Richardson, J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY CIVIL DIVISION
PO BOX 3000, SOMERVILLE, NJ 08876-1262
(908) 231-7054; TDD (908) 253-8406

TAXED COSTS FORM

Date: 3/20/01 Docket No.: L-549-97
Case Title: Public Service v. Barth
Costs of: PSE&G
X Creditor

Attorney's Allowance by Statute $40.00
Filing Fees Paid to the Clerk $175.00
TOTAL COSTS: $215.00

Date Taxed and Filed; 3/20/01
Attorney Robert Gibbs

S/Clerk of the Superior Court/Deputy Clerk

**RECEIVED/FILED**
**MAR 21 2001**
**SUPERIOR COURT SOMERSET COUNTY**

Michael Barth
P.O. Box 315
Liberty Corner, NJ 07938

PSE&G, Plaintiff
v.
Barth, et al Defendants

Superior Court of New Jersey
Law Division
DOCKET No. L-549-97
JUDGMENT

IT is on this 21st day of March 2001

ORDERED that plaintiff-condemnor PSE&G pay costs to defendant Barth in the reasonable amount of $10,000 pursuant to New Jersey Court rules as the $5,000 Judgment is greater than the $200 awarded by the commissioners and this has been a lengthy proceeding; **DENIED**

ORDERED that plaintiff condemnor PSE&G pay interest to defendant Barth in the amount of $2,057.85 pursuant to New Jersey Court rule 4:42-11 from the date of the PSE&G's "valuation" to the date of the jury verdict; **DENIED**

ORDERED that plaintiff condemnor PSE&G pay to defendant Barth the $5,000 Jury Verdict, $10,000 costs, and $2,057.85 compound interest by March 22, 2001. **DENIED**

**SO ORDERED**

S/Honorable John F. Richardson, J.S.C.

SUPERIOR COURT OF NEW JERSEY
Wilfred P. Diana
Assignment Judge
908-231-7060
Somerset County Court House
PO Box 3000
Somerville, NJ 08876
Somerset-Hunterdon and Warren Counties

September 15, 1997

To:
Michael Feldman, Esq. Presiding Commissioner
1 Veterans Memorial Drive
PO Box 8137, Somerville, NJ 08876

Michael J. Rogers, Esq.
McDonald, Rogers & Rizzolo
181 West High Street, Somerville, NJ 08876

Roger Plutar
1996 Washington Valley Rd.,
PO Box 305, Martinsville, NJ 08836

Re: PSE&G v. Barth, et al Docket No. SOM-L-549-97

Please be advised that I have appointed you as condemnation commissioners in the above matter.

Please schedule the hearing in this matter within three (3) months and notify me of the scheduled date of the hearing. I would suggest that you contact the plaintiff's attorney (listed below) in order to obtain copies of relevant pleadings and other necessary information. An early hearing date will ensure that the commissioners' report will be filed within four (4) months of the date of your appointment as required by R. 4:73-4.

The report is to be filed with the county in which the property is located. Please notify me of the date on which you file your report. If this case settles prior to the hearing, please notify me of the settlement. It has been my experience that, in some instances, commissioners are not notified by the parties that a case has been concluded by way of settlement. To avoid this

problem, I would suggest that, if an adjournment of a hearing is requested by either party to the action, you periodically contact the plaintiff's counsel to ascertain whether the case has settled.

In the event of a settlement, or upon filing of the commissioners' report, you may seek payment for your services rendered in connection with the matter. In this regard, please submit to me an Affidavit of Services and a proposed Order for Payment upon completion of your duties as commissioner.

Lastly, you will note that I have enclosed an additional form which I would ask that you complete and return to me upon submission of your Affidavit of Services and Order for Payment, or, in the event that no services are rendered by you in the matter, upon settlement of the matter. This form is part of an attempt, on my part, to ensure that appointments are distributed evenly and fairly among the members of the bar and the realtors who have indicated an interest in this work. I appreciate your assistance toward that end.

Very truly yours,
S/Wilfred P. Diana, A.J.S.C.

jp
Plaintiff's Attorney;
X. Paul Humbert, Esq.
PO Box 570 T5E,
80 Park Plaza,
Newark, NJ 07102
201-430-6481

**RECEIVED/FILED**
**97 JUN 13 AM 10:02**
WILFRED P. DIANA ASSIGNMENT JUDGE VICINAGE 13

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, a Corporation of the State of New Jersey , Plaintiff

DOCKET NO. SOM-L-549-97

v.

ORDER

MICHAEL S. BARTH;
WORLD SAVINGS BANK, Formerly known as Watchung Hills Bank for Savings, SKYLINE FEDERAL CREDITI UNION, Formerly known as the AT&T Community Federal Credit Union; and BERNARDS TOWNSHIP, a Municipal Corporation of the State of New Jersey,
Defendants.

THIS MATTER having been brought before the Court on the return date of an Order to Show Cause by X. Paul Humbert, Esq., attorney for Plaintiff, seeking the appointment of three disinterested commissioners, and by motion of Defendant, Pro Se, seeking dismissal of the Complaint and an award of costs, with notice having been given to all Defendants, and the Court having reviewed all the papers presented, and for good cause appearing;

IT IS ORDERED on this 13th day of June, 1997, that Plaintiff's Complaint is DISMISSED WITHOUT PREJUDICE, for reasons set forth in the attached letter opinion of today's date. As such, Plaintiff's request to have commissioners appointed is also DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Defendant's motion for costs is DENIED.

S/Wilfred P. Diana, A.J.S.C.

THIS ORDER SHALL BE SERVED UPON COUNSEL FOR ALL PARTIES WITHIN 7 DAYS THEREOF.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE PLACED ON THE RECORD ON 6/13/97

State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza, CN 049
Trenton, New Jersey 08625
(609) 588-6540

Joseph F. Fidler
Administrative Law Judge

April 17, 1996

Richard Fryling, Jr. Esq.
PSE&G Co.
80 Park Plaza
PO Box 570
Newark, NJ 07102

Rachel Boylan, DAG
Division of Law
124 Halsey Street
PO Box 45029
Newark, NJ 07101

Mr. Michael Barth
PO Box 315
Liberty Corner, NJ 07938

Re: IMO Petition of PSE&G, OAL Dkt. No. PUC 8366-94

Dear Messrs. Barth and Fryling and Ms. Boylan:

On March 21, 1996, Mr. Barth filed a letter memorandum in opposition to petitioner's post-hearing brief, together with a motion to compel the production of transcripts. Counsel for petitioner and counsel for the Staff of the Board of Public Utilities responded in opposition to respondent's motion with letter memorandum received April 3 and 4, 1996. On April 10, 1996, Mr. Barth filed a motion for an order to reopen the record. Petitioner's letter response to the second motion was received on April 15, 19[9]6.

Mr. Barth asserts that a party who orders transcripts and refers to them in pleadings is required to provide a copy of the transcripts to the opposing party. He contends that since petitioner announced at the hearing that it was required to pay for a transcript, it should be ordered to produce a copy at no expense to respondent. Mr. Barth further asserts that he may reserve a

right to file his post-hearing brief one week after receipt of the transcript.

The authority Mr. Barth cites for his motion to compel the production of transcripts is not applicable. He has referenced the New Jersey Court Rules governing appeals to the Appellate Division and the Supreme Court. The applicable rules are N.J.A.C. 1:1-14.11 and N.J.A.C. 1:14-14.3, neither of which require that the party ordering a transcript provide a copy at no cost to other parties. Pursuant to these rules, a copy of the transcript was filed with the Office of Administrative Law on February 16, 1996. As a public record, a hearing transcript on file at the Office of Administrative Law may be inspected and may be copied, in accordance with the public records copy fees payment schedule. (C. 47:1A-2).[2]

There is an additional reason to deny Mr. Barth's motion to compel production of the transcript of the hearing. My request that the parties submit post-hearings briefs and the original schedule for their submission were set forth in my letter of January 31, 1996. This schedule called for briefs within three weeks following receipt of my letter, with replies within one week following receipt of the initial submissions. I made no reference to waiting for a transcript to be available before the briefing schedule would begin, as the hearing had been brief and the evidential record was not voluminous.

However, by letter dated February 5, 1996, Mr. Barth sought leave to file his brief after receipt of the transcript. Counsel for petitioner and counsel for Board Staff did not respond to Mr. Barth's request. After ascertaining that the transcript had been prepared and filed with the Office of Administrative Law on February 6, 1996, Ms. Lysa Martino contacted counsel and Mr. Barth by telephone at my instruction and notified them that the initial briefs would now be due on March 8, 1996, which was three weeks after the transcript was filed. During one telephone

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[2]The copy fee for pages one through ten is 75 cents per page. For pages eleven through twenty, the copy fee is 50 cents per page. For all additional pages, the fee is 25 cents per page.

conversation with Ms. Martino on or about February 23, 1996, Mr. Barth stated in essence that he had not received the transcript and, not intending to pay for it, he therefore would not be filing a post-hearing submission. Ms. Martino asked that Mr. Barth put this in writing, but he did not. Board Staff's post-hearing brief was filed on March 8 and petitioner's post-hearing brief was filed on March 11, 1996. Mr. Barth's motion filed March 21, 1996, to compel production of the transcript and reserve the right to file a post-hearing brief, is thus not only without legal support, it is also untimely.

Mr. Barth has also moved to reopen the evidential record. He asserts that additional testimony should be permitted regarding the construction of the temporary pipeline. However, he has made no showing that there is any relevant evidence to be produced on this subject. Thus the extraordinary relief sought is not warranted. N.J.A.C. 1:1-18.5 (c ).

Both of Mr. Barth's post-hearing motions make extensive argument concerning the proofs which were presented at the hearing and the applicable law. As such, they are more than adequately represent post-hearing briefs in support of Mr. Barth's factual and legal contentions on the merits. I will accept and consider these post-hearing papers as his final submissions, and I will accept and consider the responsive papers of petitioner and Board Staff as their final written submissions. The last of these was received on April 15, 1996, and the record is deemed to be closed as of that date.

It is so ORDERED

This Order may be reviewed by the BOARD OF PUBLIC UTILITIES, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10, or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

Very truly yours,
S/Joseph F. Fidler, ALJ
JFF:lam